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Nos. 87-470 and 87-614

In the

Supreme Court of the United States

October Term, 1987

FORT WAYNE BOOKS, INC.,

Petitioner,

vs.

STATE OF INDIANA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

and

RONALD W. SAPPENFIELD, FANTASY ONE, INC., and FANTASY TWO, INC.,

Petitioners,

vs.

STATE OF INDIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS FOR THE FIRST DISTRICT

MOTION OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, AND INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS, AND BRIEF ATTACHED.

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—o—

STATEMENT

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, and the International

Periodical Distributors Association, Inc. (collectively referred to as *amici*), hereby respectfully move for leave pursuant to Rule 42 of the Rules of the Supreme Court of the United States to file the attached joint brief, *amici curiae*, in support of the petitioners, Fort Wayne Books, Inc., Ronald W. Sappenfield, Fantasy One, Inc., and Fantasy Two, Inc. Attorneys for petitioners consented thereto; the consent of the attorney for respondents was requested but refused.

The Amici

The *amici's* members publish, produce, distribute, and sell books, magazines, and other printed materials of all types, including those which are scholarly, literary, scientific and entertaining.

The American Booksellers Association, Inc. (ABA) is the major national association of booksellers in the United States. ABA has approximately 4,000 members consisting of over 6,000 retail outlets. The members include private book stores, department book stores, university book stores and chain book stores.

The Association of American Publishers, Inc. (AAP) is the major national association in the United States of publishers of general books, textbooks and educational materials. Its members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books and materials produced in the United States. These works are sold and distributed in all fifty states to schools, universities and libraries and through thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities.

The Council for Periodical Distributors Associations is the national trade association for almost four hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

Interest of the Amici

The interest of *amici* reflects their continuing interest in the decisions of this Court involving the balancing of First Amendment rights and restrictions on materials with sexual content. *Amici's* brief will demonstrate how the legal principles involved in these two cases impact upon those who produce, distribute and sell material which is not obscene.

Although the cases *sub judice* involve "adult" bookstores, the RICO statute upheld by the Indiana Supreme Court, and similar RICO statutes in other jurisdictions,[1]

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[1] The Indiana RICO statute is modeled after the Federal RICO statute (18 U.S.C. § 1961 *et seq.*) and is similar to the RICO statutes of many other states.

are by no means limited to businesses which deal primarily in sexually explicit materials. In fact the padlocking of stores and massive seizure of printed materials involved in the two cases decided below did not distinguish between obscene and First Amendment protected materials. Everything was seized. The statute is drawn so broadly that it permits the massive seizure and forfeiture of assets, including non-obscene books and periodicals, from a business that does not carry a single obscene title but is shown only to have violated provisions relating to materials deemed "harmful to minors." Such a harsh possible result obviously chills the exercise of First Amendment rights by the legitimate booksellers, distributors and publishers who are the members of *amici*.

This concern of legitimate businesses is not unwarranted. There has been rising agitation directed against booksellers, publishers and distributors handling First Amendment protected materials. *Amici* cite but a few troubling recent examples. In Alabama, the District Attorney of the City of Montgomery embarked on an unlawful campaign to coerce bookstore and newsstand owners from carrying any future issues of periodicals which he deemed objectionable, but which were adjudged to be protected by the First Amendment. See *Council for Periodical Distributors Association v. Evans*, 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd in part and vacated in part*, 827 F.2d 1483 (11th Cir. 1987). At the national level, the Attorney General's Commission on Pornography ("Commission") branded convenience and drug store chains as purveyors of pornography, leading to a court order requiring the retraction of the charge and advice to the recipients that earlier communications from the Commission were of

no legal effect and to be ignored. *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp 581 (D.D.C. 1986). In its subsequent July 1986 report, the Commission not only endorsed broad new law enforcement initiatives, but also encouraged "private" censorship efforts as a "coercive force" to "control" the availability of materials concededly protected by the First Amendment. Attorney General's Commission on Pornography, *Final Report*, 421-23 (July 1986).

In fact, in furtherance of its goals, the Commission listed as one of its recommendations that state legislatures enact RICO statutes which have obscenity offenses as predicate acts, because "RICO provides as effective means to substantially eliminate obscenity businesses." *Id.* at 435, 498. Although the Commission did not say so, RICO also provides an effective means to eliminate legitimate businesses which may have inadvertently crossed the gray line between what is obscene and what is not, as well as an effective means to coerce legitimate businesses into refraining from stocking or distributing First Amendment protected material which may not meet with the approval of a faction in the community.

Unless the Court reaffirms the existing doctrine relating to prior restraints, and continues to insist on adequate procedural safeguards where seizures of presumptively First Amendment protected materials are involved, RICO statutes like the Indiana law in these cases will surely chill the production and distribution of a wide range of First Amendment protected materials.

Amici filed an *amicus* brief in *Fort Wayne Books, Inc. v. Indiana* in support of the petition for certiorari, their

motion to file same having been granted. 108 S. Ct. 1106 (1988).

In view of the foregoing, *amici* seek leave to file the attached brief.

Respectfully submitted,

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STATEMENT

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, and the International Periodical Distributors Association, Inc. (collectively re-

ferred to as *amici*), submit this joint brief, *amici curiae,* Ronald W. Sappenfield, Fantasy One, Inc., and Fantasy in support of the petitioners, Fort Wayne Books, Inc., Two, Inc., having submitted a motion for permission to file same.

Interest of the Amici and Summary of Argument

The interest of the *amici* reflects their continuing interest in the decisions of this Court balancing First Amendment rights and restrictions on materials with sexual content. *Amici's* brief will demonstrate how the RICO penalties at issue in these two cases create an unconstitutional prior restraint on First Amendment protected materials, and will have a chilling effect on the activities of those who produce, distribute and sell material which is not obscene.

Although the cases *sub judice* involve "adult" bookstores, the RICO statute upheld by the Indiana Supreme Court, and similar RICO statutes in other jurisdictions, are by no means limited to businesses which deal primarily in sexually explicit materials. In fact the padlocking of stores and massive seizure of printed materials involved in the two cases decided below did not distinguish between obscene and First Amendment protected materials. Everything was seized. The statute is drawn so broadly that it permits the massive seizure and forfeiture of assets, including non-obscene books and periodicals, from a business that does not carry a single obscene title but is shown only to have violated provisions relating to materials deemed "harmful to minors." The threat of such a death penalty on one's business obviously chills the exercise of First Amendment rights by booksellers, distributors and publishers who are not themselves dealers in obscene ma-

terials. Cautious booksellers would avoid any publication which treads too close to the obscenity or "harmful to minors" threshold for fear of triggering draconian RICO penalties.

The concern of legitimate businesses that these RICO statutes will be used to curtail protected speech and publishing activities is hardly speculative. There has been rising agitation directed against booksellers, publishers and distributors handling First Amendment protected materials. *Amici* cite but a few troubling recent examples. In Alabama, the District Attorney of the City of Montgomery embarked on an unlawful campaign to coerce bookstore and newsstand owners from carrying any future issues of periodicals which he deemed objectionable, but which were adjudged to be protected by the First Amendment. See *Council for Periodical Distributors Association v. Evans,* 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd in part and vacated in part,* 827 F.2d 1483 (11th Cir. 1987). At the national level, the Attorney General's Commission on Pornography (the "Commission") branded convenience and drug store chains as purveyors of pornography, leading to a court order requiring the retraction of the charge and advice to the recipients that earlier communications from the Commission were of no legal effect and to be ignored. *Playboy Enterprises, Inc. v. Meese,* 639 F. Supp. 581 (D.D.C. 1986). In its subsequent July 1986 report, the Commission not only endorsed broad new law enforcement initiatives, but also encouraged "private" boycotts, picketing, and other "private" censorship efforts as a "coercive force" to "control" the availability of materials concededly protected by the First Amendment. Attorney

General's Commission on Pornography, *Final Report* at 421-23 (July 1986).

In fact, in furtherance of its goals, the Commission listed as one of its recommendations that state legislatures enact RICO statutes which have obscenity offenses as predicate acts, because "RICO provides an effective means to substantially eliminate obscenity businesses." *Id.* at 435, 498. Although the Commission did not say so, RICO also provides an effective means to eliminate legitimate businesses which may have inadvertently crossed the gray line between what is obscene or "harmful to minors" and what is not, as well as an effective means to coerce legitimate businesses into refraining from stocking or distributing First Amendment protected material which offends a vocal minority within a community.

Amici contend that the Indiana RICO statute and similar statutes violate the First Amendment in that they constitute an unconstitutional prior restraint on First Amendment protected materials under the doctrine first defined in *Near v. Minnesota*, 283 U.S. 697 (1931), that the statutes will have a chilling effect on First Amendment protected expression, and, further, that the statutes do not include the special protections that the Court has consistently imposed with respect to the seizure of presumptively First Amendment protected material.

The Challenged Statute

The Indiana RICO statute was enacted in 1980, and is similar to the federal RICO statute, 18 U.S.C. § 1961 *et seq.* Basically, the statute provides that anyone who

acquires, maintains, or participates in any business through a "pattern of racketeering activity" is guilty of "corrupt business influence," a Class C felony. Ind. Code § 35-45-6-2. A pattern of racketeering activity is in turn defined as commission in the course of five years of two related offenses from a list of specified offenses. Ind. Code § 35-45-6-1. As interpreted by the Indiana Supreme Court, conviction for the offenses is not required. *4447 Corporation v. Goldsmith*, 504 N.E.2d 559, 566 (Ind. 1987). The list of offenses includes all Indiana obscenity law crimes. These crimes include not only importation or sale of obscene matter (Ind. Code § 35-49-3-1), but also disseminating to minors matter harmful to minors, displaying matter harmful to minors in an area to which minors have visual, auditory or physical access, or displaying for sale matter harmful to minors within 500 feet of a church or school. (Ind. Code § 35-49-3-3). In addition to the criminal penalty, the State may invoke the full panoply of civil sanctions contained in Indiana Code Sections 34-4-30.5-1 through 30.5-4.

The civil remedies available for a violation of the Indiana RICO law are severe. They include forfeiture of any property derived from or used in the course of the RICO violation. Ind. Code § 34-4-30.5-3. Property may even be seized for forfeiture, and placed under seal or removed, by an officer on ex parte court order up to 180 days prior to the filing of any formal adversary forfeiture action. Ind. Code § 34-4-30.5-4. In the cases *sub judice* the entire contents of several bookstores were seized, without even an *ex parte* review of most of the material, which included First Amendment protected materials. In

fact, the Indiana Supreme Court stated it to be "irrelevant" whether the assets seized and forfeited were obscene or not. 504 N.E.2d at 565. In addition, the Court may, on the bringing of an action to enjoin a violation, issue an injunction "prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of" the RICO law. Ind. Code § 34-4-30.5-2(2).

An injunction will be granted on a showing by a preponderance of the evidence that a RICO violation has occurred. Similarly, property may be civilly forfeited on a showing by a preponderance of the evidence that the property was derived from or used in the course of a RICO violation. Thus, massive forfeitures of property and injunctions against engaging in similar businesses in the future may be effected even without a criminal conviction for the triggering violations, which, if it were required, would require proof beyond a reasonable doubt. As described by the Indiana intermediate appellate court, the RICO statute permits "seizure orders of indefinite duration and create[s] a remedy of permanent forfeiture which would extend the protected materials and neutral instrumentalities." *4447 Corporation v. Goldsmith*, 479 N.E.2d 578, 590 n. 8 (Ind. Ct. App. 1985).

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ARGUMENT

I

THE INDIANA RICO STATUTE CONSTITUTES AN UNCONSTITUTIONAL PRIOR RESTRAINT WHEN APPLIED BASED ON PREDICATE OFFENSES RELATING TO PRESUMPTIVELY FIRST AMENDMENT PROTECTED MATERIAL.

The Indiana RICO statute provides for pre-judgment seizure and subsequent forfeiture of "any property used in the course of, intended for use in the course of, derived from, or realized through" a RICO violation. Ind. Code §§ 34-4-30.5-3 and 30.5-4. The overwhelming majority of books in a typical bookstore are not obscene, and most could not be deemed harmful to minors. Nevertheless, if over a five year period a store twice sold books judged by a particular community to be obscene, or sold to two minors books deemed harmful to those minors, or even, under the Indiana law, merely displayed two books harmful to minors in an area accessible to minors, the entire inventory of the store and all of its assets would be subject to forfeiture.[2] The store would thus be prevented from distributing the protected materials which at all times constituted an overwhelming portion of its business. The intent and obvious effect of this forfeiture provision (as demonstrated by its enforcement in this case and its companion cases below) is to cause a forfeiture of the entire business enterprise through which the violation was com-

[2] It may, in fact, subject the assets of an entire chain of stores to seizure and forfeiture. In a recent federal RICO indictment brought in the Eastern District of Virginia, forfeiture of a chain of video stores was sought. *United States v. Pryba*, 674 F. Supp. 1504 (E.D. Va. 1987).

mitted, and thereby prevent the individuals involved from continuing in the same general line of business. Ind. Code § 34-4-30.5-2(2) lends further support to this construction, since it expressly authorizes a court to issue an injunction prohibiting a defendant from engaging in a similar business.

When the predicate offense relates to sexually explicit materials and when the business is a bookstore, chain of stores, distributor of written materials, or publisher, these RICO penalties clearly constitute a prior restraint violative of the First Amendment. The Court has consistently stated that "[a]ny system of prior restraint, however, 'comes to this Court bearing a heavy presumption against its constitutional validity.' *Bantam Books, Inc. v. Sullivan,* 372 U.S., at 70; *New York Times Co. v. United States,* 403 U.S., at 714; *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971); *Carroll v. Princess Anne,* 393 U.S. 175, 181 (1968); *Near v. Minnesota ex rel. Olson,* 283 U.S., at 716. The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable. See *Speiser v. Randall,* 357 U.S. 513 (1958)." *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 558-559 (1975) (quoted with approval in *Vance v. Universal Amusement Co.,* 445 U.S. 308, 316 n. 13 (1980)).

The prior restraint imposed in these two cases and generally permitted under the Indiana and other similar RICO statutes is virtually identical to that struck down by the Court over 50 years ago in *Near v. Minnesota,* 283 U.S. 697 (1931). The statute in *Near* authorized enjoining a person who published an obscene or defamatory periodical from further publication of the periodical. Consistently since *Near* it has been clear that one cannot be punished for speech by the prohibition of future speech. *See, e.g., City of Paducah v. Investment Entertainment, Inc.,* 791 F.2d 463 (6th Cir.), *cert. denied,* 107 S. Ct. 316 (1986); *Gayety Theaters, Inc. v. City of Miami,* 719 F.2d 1550 (11th Cir. 1983); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.,* 485 F. Supp. 777 (D. Utah 1980).

Notwithstanding *Near* and its progeny, the Supreme Court of Indiana swept aside prior restraint concerns by reasoning that the RICO statute's forfeiture remedy

> "is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity. Stated simply, it is irrelevant whether assets derived from an alleged violation of the RICO statute are or are not obscene."

4447 Corporation v. Goldsmith, 504 N.E.2d at 565 (Ind. 1987).

This Court, however, has made clear that the question of whether a statute operates a prior restraint must be determined not through such formal anaylsis but through a realistic inquiry into the actual effects of the

statute on protected expressive activity. As stated in *Near*, "in passing upon constitutional questions the court has regard to substance and not to mere matters of form . . . ; in accordance with familiar principles, the statute must be tested by its operation and effect." *Near v. Minnesota*, 283 U.S. at 708. As further stated in *Organization For A Better Austin v. Keefe*, a prior restraint exists where "the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature. . . ." 402 U.S. at 418-419 (1971).

The plain effect of the forfeiture provision is to restrain future expression because of the content of prior expression. The court below avoided First Amendment analysis merely by recharacterizing the seized books and periodicals as "assets acquired through racketeering activity," indistinguishable from drugs, gambling equipment or other contraband. No such facile recharacterization can alter the fact that the statute's seizure and forfeiture provisions create the substantive harm that prior restraint doctrine aims to prevent—the repression of valuable expressive materials, which have not been adjudged obscene, as a consequence of prior speech. Labelling such expression as "racketeering" can no better strip away First Amendment protection than does labelling speech or speakers as "Nazi" (*Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978)); "Communist" (*DeJonge v. Oregon*, 299 U.S. 353 (1937)); anti-semitic (*Near v. Minnesota, supra*); or "subordinators of women"

(*American Booksellers Ass'n, Inc. v. Hudnut*, 774 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986)).[3]

The flaw in the Indiana RICO provisions is thus the same as in both *Near* and *Vance v. Universal Amusement Co.*, 445 U.S. at 311, fn. 3:

> In both cases the state made the mistake of prohibiting future conduct after a finding of undesirable present conduct. When that future conduct may be protected by the first amendment, the whole system must fail because the dividing line between protected and unprotected speech may be "dim and uncertain." *Bantam Books v. Sullivan* [cite omitted]. The separation of these forms of speech calls for "sensitive tools," *Speiser v. Randall* [cite omitted].

Such sensitivity is hardly shown by the statement of the court below that the separation between obscene and protected materials is "irrelevant."

While the RICO statute's forfeiture penalties clearly operate as an unconstitutional prior restraint when applied, perhaps more ominous and pervasive is the chilling effect which the mere threat of these draconian penalties will have on protected First Amendment activities. Booksellers, distributors and publishers will doubtless be inclined to avoid a provocative publication which may be viewed by

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[3] To the extent that crimes of violence or coercion are committed in the production of sexually-oriented material, state and federal laws, including RICO laws, provide ample opportunity for the prosecution of perpetrators. The only effect of adding the specific crime of dealing in obscenity to the list of predicate RICO offenses is to target RICO's harsh penalties at those who are criminals solely because the content of their speech is offensive. Hence, the ones prosecuted under the statute *sub judice* are not organized criminals or those who allegedly use kidnapping, violence, drugs, or coercion in the course of producing obscene material.

some as too close to the obscenity threshold when an error in judgment could lead to the forfeiture of one's business. The threat to First Amendment protections is always especially acute where questions of obscenity or "harmful to minors" are involved because "constitutionally protected expression . . . is often separated from obscenity only by a dim and uncertain line." *Bantam Books v. Sullivan,* 372 U.S. at 66 (1963). While the question of whether a chemical substance is an illegal drug may be determined objectively in any laboratory, the determination as to whether books or periodicals are obscene will vary from community to community, and from jury to jury, as each applies the standard of *Miller v. California,* 413 U.S. 15 (1973). The threshold of First Amendment protection becomes even dimmer and less certain when the "harmful to minors" standard of *Ginsberg v. New York,* 390 U.S. 629 (1968), is at issue, since such material by definition is First Amendment protected and has serious literary, artistic, political, or scientific value.[4]

Many familiar examples serve as reminders that books now recognized as literary classics were once banned as obscene under the standards of their day. If a RICO statute like the one involved in these cases had been widespread a few decades ago, booksellers might have had

[4] That such "harmful to minors" statutes are subject to a multitude of widely divergent interpretations is well demonstrated by this Court's recent decision in *Virginia v. American Booksellers Association, Inc.,* 108 S. Ct. 636 (1988) (certifying to the Virginia Supreme Court the question of how such a statute should be interpreted). In the absence of a definitive state court interpretation of a "harmful to minors" statute, a bookseller could find his store padlocked after an *ex parte* RICO hearing merely because he had sold or displayed copies of a provocative bestseller to minors.

their doors padlocked merely for stocking the latest copies of works by Theodore Dreiser, D.H. Lawrence, or Edmund Wilson. *Commonwealth v. Friede,* 271 Mass. 318, 171 N.E. 472 (1930) (Dreiser's *An American Tragedy* held obscene); *Commonwealth v. Delacey,* 271 Mass. 327, 171 N.E. 455 (1930) (Lawrence's *Lady Chatterley's Lover* held obscene); *People v. Doubleday & Co.,* 272 App. Div. 799, 71 N.Y.S. 2d 736, *aff'd* 297 N.Y. 687, 77 N.E.2d 6 (1947), *aff'd* 335 U.S. 848 (1948) (Wilson's *Memoirs of Hecate County* held obscene). Such cases as *Playboy Enterprises, Inc. v. Meese,* 639 F. Supp. 581 (D.D.C. 1986) and *Council for Periodical Distributors Association v. Evans,* 642 F.Supp. 552 (M.D. Ala. 1986), *aff'd in part and vacated in part,* 827 F.2d 1483 (11th Cir. 1987), show the real danger that a vocal minority in a community will use the RICO statutes to threaten the very business of any bookseller who deals in material which, though constitutionally protected, they deem objectionable. The burden will be particularly great on a regional or national book or periodical business which, by distributing material which might be considered obscene or harmful to minors in only two communities in the state, could potentially have its entire business seized.

II

THE INDIANA RICO STATUTE IS ALSO UNCONSTITUTIONAL BECAUSE IT LACKS ANY OF THE PROCEDURAL SAFEGUARDS REQUIRED WHEN PRESUMPTIVELY FIRST AMENDMENT PROTECTED MATERIALS ARE SEIZED.

The Indiana RICO statute is also unconstitutional and should also be invalidated for failure to comply with the Court's prior rulings imposing procedural safeguards on

the seizure of presumptively First Amendment protected materials. Under the statute, property may be seized for forfeiture up to 180 days before any forfeiture action is even commenced. Ind. Code § 34-4-30.5-4. Furthermore, when the forfeiture proceeding is eventually filed, the statute imposes no fixed time limit for judicial resolution of the action, and does not even urge that resolution be prompt. In both of the cases under review, the trial courts' orders compelling the padlocking of bookstores and the seizure of all items within were issued after *ex parte* hearings, without notice to the booksellers or their attorneys. To this day, no trial date has been set in either case. This open-ended period of seizure, based on a mere probable cause showing, violates the requirement that "any restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." *Freedman v. Maryland*, 380 U.S. 51, 59 (1965).

As stated in *Speiser v. Randall*, 357 U.S. at 525 (1958), the separation of obscene and protected speech requires "sensitive tools." State and federal RICO statutes are anything but sensitive tools, as evidenced by the statement of the Indiana Supreme Court that the obscenity or non-obscenity of the seized assets is irrelevant.[5] *4447 Cor-*

[5] Even where First Amendment concerns are absent, the RICO penalty provisions have been severely criticized as crude and insensitive tools, lacking in various procedural safeguards. *See, e.g.*, Markus, *Procedural Implications of Forfeiture Under RICO, the CCE and the Comprehensive Forfeiture Act of 1984: Reforming the Trial Structure*, 59 Temple L. Q. 1097 (1986); Note, *Civil RICO Is A Misnomer: The Need for Criminal Procedural Protections In Actions Under 18 U.S.C. § 1964*, 100 Harvard L. Rev. 1288 (1987).

poration v. Goldsmith, 504 N.E.2d at 565. To permit the broadscale seizure and forfeiture of protected expressive materials by means of RICO statutes is to make a mockery of the constitutionally required procedural safeguards imposed to guard against prior restraint of materials presumptively protected by the First Amendment.

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CONCLUSION

As this Court has recently reiterated, "[f]reedoms of expression require 'breathing space.'" *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 880 (1988) (quoting *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986)). Moreover, the prior restraint doctrine is premised on the conviction that the circulation of offensive speech is a lesser cost than the unacceptable alternative of suppressing protected expression. As Madison said of the press: "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits." 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 571 (J. Elliott ed. 1866). Whatever the wisdom of pursuing the eradication of sexually explicit materials, attempts to eliminate them can only be undertaken after complying with First Amendment requirements of heightened sensitivity, and procedural safeguards so that provocative, unorthodox and even offensive ideas and modes of expression are not quashed.

For the reasons set forth above, we respectfully urge this Court to reverse the orders under review.

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